

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 20, 2006

STATE OF TENNESSEE v. JERMAINE RASHAD CARPENTER

Appeal from the Criminal Court for Sullivan County
Nos. S47,268; S47,952-53; S48,536; and S48,245 Phyllis H. Miller, Judge

No. E2006-00775-CCA-R3-CD - Filed February 27, 2007

The defendant, Jermaine Rashad Carpenter, appeals from the Sullivan County Criminal Court's orders revoking his community corrections and probationary sentences. The record supports the orders of revocation, and we affirm the criminal court's orders but remand for the correction of a clerical error in one judgment.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and DAVID H. WELLES, J., joined.

Stephen M. Wallace, District Public Defender; and William A. Kennedy, Assistant District Public Defender, for the Appellant, Jermaine Rashad Carpenter.

Robert E. Cooper, Jr., Attorney General & Reporter; Jennifer L. Bledsoe, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Teresa Murray Smith, Assistant District Attorney General, for the Appellant, State of Tennessee.

OPINION

The defendant was convicted of numerous drug-related offenses and received a total effective sentence of 17 years to be served in community corrections in case numbers S47,268;

S48,245; and S48,536 followed by four years of probation in case numbers S47,952 and S47,953.¹ The defendant's various convictions are summarized as follows:

Case	Count	Offense	Class	Sentence	Alignment
S47,268	One	Possession of cocaine with intent to sell ²	Class B felony	9 years Department of Correction (TDOC)	consecutive to count two; S47,952; S47,245 and S48,536
	Two	Possession of Schedule III drug with intent to sell	Class D felony	3 years TDOC	consecutive to count one
	Three	Driving on a revoked license ³	Class B misdemeanor	6 months in county jail	concurrent with count one
	Four	Violation of light law	Class C misdemeanor	30 days in county jail	concurrent with count one
S47,952	One	Sale of cocaine	Class C felony	4 years TDOC/ four years probation	concurrent with S47,953; consecutive to S47,268; S48,245; S48,536

¹It appears from the record before us that the defendant was placed on community corrections pursuant to Tennessee Code Annotated section 40-36-106(a). *See* T.C.A. § 40-36-106(a) (2006). Thus, the presence of the nine-year sentence in count one of case number S47,268 does not disqualify him although he is not eligible for probation on this count. *See State v. Kenneth Javon Bills*, No. W2001-00396-CCA-R3-CD (Tenn. Crim. App., Jackson, May 10, 2002) (affirming incarcerative sentence because defendant was ineligible for community corrections sentence under section 40-36-106(a) because he committed a violent felony with a firearm and ineligible under “special needs” provision, section 40-36-106(c), because his sentence exceeded eight years); *State v. Rhonda Lorraine Hanke*, No.03C01-9707-CC-00254 (Tenn. Crim. App., Knoxville, Aug. 20, 1998) (affirming incarcerative sentence because defendant ineligible for “special needs” community corrections under section 40-36-106(c) due to probation ineligibility because sentence exceeded eight years).

²The defendant was originally charged with possession of cocaine with intent to sell within 1,000 feet of a school, a Class A felony. *See* T.C.A. §§ 39-17-417, -432 (2006). The jury convicted the defendant of the lesser-included offense of possession of cocaine with the intent to sell, a Class B felony. *See id.* § 39-17-417.

³The judgment incorrectly lists Code section 55-10-504, for this offense. As discussed below, we remand for the correction of this judgment to reflect the correct Code section 55-50-504. *See* T.C.A. § 55-50-504 (2006).

S47,953	One	Violating implied consent law	Class E felony	18 months TDOC/ 18 months probation	concurrent with S47,952; consecutive to S47,268; S48,245; S48,536
S48,245	One	Failure to appear	Class E felony	1 year TDOC	consecutive to S47,268; S47,952; S48,536
S48,536	One	Sale of cocaine	Class C felony	4 years TDOC	consecutive to S47,268; S47,952; S48,245

The State filed a violation of community corrections warrant on August 30, 2005, in case numbers S47,268; S48,245; and S48,536 and a probation violation warrant on November 23, 2005, in case numbers S47,952 and S47,953. Both warrants alleged that the defendant violated the rules by garnering new criminal charges.

The court held an evidentiary hearing on April 10, 2006, and community corrections officer Stewart Canter testified that he began supervising the defendant in September 2004. He testified that he reviewed the community corrections rules with the defendant and that the defendant was a resident of the John R. Hay House community corrections facility until January 31, 2005, when he was advanced to “Phase II” after following all recommendations, obtaining evaluations, and attending counseling. Mr. Canter testified that the defendant did “very well” aside from one incident within the first month of supervision when the defendant admitted to drinking alcohol. He also testified that the defendant worked at “Sambeto Floor, Creative Flooring,” adhered to his weekly reporting schedule during Phase II, and participated in community service projects.

Mr. Canter further testified that the defendant had done everything required of him; however, he testified that he was not aware that the defendant was “breaking the law” during this time. He learned of the defendant’s new drug charges on August 25, 2005, and as a result, he filed a violation warrant four days later.

Kingsport Police Department Detective Sean Chambers, who was assigned to the Vice Unit in 2005, testified that he began investigating the defendant in April 2005. He testified that on April 4, 2005, at approximately 1:30 p.m., he, Officer Mark Johnson, who was stationed in Iraq at the time of the hearing, and an informant Gaines met at a prearranged location. Detective Chambers searched the informant and the vehicle and installed surveillance equipment. He then followed Officer Johnson and the informant to the M&M Market on Eastman Road, maintaining visual contact and monitoring audio surveillance equipment. Detective Chambers parked in a different parking lot approximately 100 to 200 feet away.

Detective Chambers testified that he observed a Buick drive into the parking lot, and Officer Johnson and the informant entered the Buick. He testified that he heard via the audio recording device the men introduce themselves as "Jermaine and Mark." He reiterated that Mark was Officer Johnson's first name. Detective Chambers testified that Officer Johnson and the informant remained in the Buick for approximately two to three minutes. The Buick and the undercover car exited the parking lot. Detective Chambers did not see the face of the Buick's occupant.

Detective Chambers, Officer Johnson, and the informant returned to the prearranged location, and Detective Chambers took possession of the substance bought from the occupant of the Buick.

Detective Chambers testified that on April 14, 2005, at approximately 2:00 p.m., he, Officer Johnson, and the informant, again met at a prearranged location. He adhered to the same procedures as in the first operation, and he followed the two men to Ryan's Steakhouse parking lot on Memorial Boulevard, maintaining visual, audio, and video surveillance. This transaction took place no more than 100 feet away, and Detective Chambers could not remember whether it took place in the same Buick. He testified that he heard, via the audio equipment, Officer Johnson say, "'You're always hooking me up, man,' and [Detective Chambers testified] that was pretty much all the talk that was done on that [transaction]."

Detective Chambers testified that he never saw the seller's face and unlike in the first operation when the video equipment failed, a videotape recording was made of the transaction; however, it never showed the seller's face. After the transaction, he met Officer Johnson and the informant at the prearranged location.

Detective Chambers testified that after both transactions, he took possession of the drugs and field tested them. Both substances tested positive for cocaine. He also testified that the drugs remained in police custody and were tested by the Tennessee Bureau of Investigation's Crime Laboratory. The report revealed that the substances contained cocaine.

Detective Chambers testified that after identifying the substances as cocaine and after the defendant was indicted, he arrested the defendant at the "Hay House." Once at the police station, Detective Chambers "read [the defendant's rights] to him verbatim," and the defendant consented to talk after signing a statement of rights and a waiver of rights form. Detective Chambers testified that the defendant made the following statement:

I have been selling cocaine since about February of 2005. I was working at Lowe's until then. When I started partying again I lost my job at Lowe's. I had to make ends meet so I started selling cocaine. That's how I made money to live. That's what I did to make my living. I would just get my cocaine from whoever I could get it from.

I didn't have one particular supplier. The above statement is true and correct to the best of my knowledge.

Probation Officer David Tankersley⁴ testified that the defendant was sentenced to serve four years' probation after his 17-year community corrections sentence. Mr. Tankersley testified that he was assigned to track the defendant during his community corrections sentence and then supervise him during his four-year probationary sentence. Mr. Tankersley testified that he had not begun supervising the defendant and had not reviewed the probation rules with the defendant, but he testified to the defendant's birth date, Social Security number, and "TOMIS" number. He further testified that the defendant had not gone through the intake process.

Following the evidentiary hearing, the trial court ordered that the defendant's community corrections and probationary sentences be revoked. The court stated that the standard of proof was by a preponderance of the evidence, not beyond a reasonable doubt. The court also stated, regarding the State's proof, that "it [was] about the weakest [the court had] ever heard, but . . . it [was] weak because . . . [of the defendant's] right to a speedy hearing . . . and [Officer Johnson] is not going to be back until the end of the year"

Applying the preponderance of the evidence standard, the court found that Detective Chambers was investigating the defendant for selling cocaine, that neither Officer Johnson nor the informant possessed drugs before the transactions, that Detective Chambers observed the two until they met at the prearranged location, that the substances tested positive for cocaine, that the person's name in the car was Jermaine, and that the defendant admitted to selling cocaine during the time period of the two transactions. Based on this evidence, the trial court found that the defendant violated the community corrections rules and probation rules. The court thus ordered the defendant to serve a total effective sentence of 21 years.

The defendant now appeals, arguing that "[t]he trial court abused its discretion in revoking the appellant's probation and ordering him to serve his sentence." We disagree with the defendant's argument and affirm the orders of the trial court.

The decision to revoke a community corrections sentence or probation rests within the sound discretion of the trial court and will not be disturbed on appeal unless there is no substantial evidence to support the trial court's conclusion that a violation has occurred. *State v. Harkins*, 811 S.W.2d 79, 82-83 (Tenn. 1991) (applying the probation revocation procedures and principles contained in Tennessee Code Annotated section 40-35-311 to the revocation of a community corrections placement based upon "the similar nature of a community corrections sentence and a sentence of probation"). The trial court is required only to find that the violation of probation or community corrections occurred by a preponderance of the evidence. *See* T.C.A. § 40-35-311(e) (2006); *see also id.* § 40-36-106(e)(3)(B). "It is of no consequence that revocation occurred prior to the commencement of the probationary term." *State v. Israel Allen Jackson*, No.

⁴The transcript incorrectly states Mr. Tankersley's name as "Tankerslee."

M2005-00365-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Nashville, Nov. 9, 2005). In reviewing the trial court's findings, it is our obligation to examine the record and determine whether the trial court has exercised a conscientious judgment rather than an arbitrary one. *State v. Mitchell*, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991).

If the evidence is sufficient, the trial court may, within its discretionary authority, revoke the community corrections sentence and require the defendant to serve his sentence in confinement. T.C.A. § 40-36-106(e)(4). Upon finding a probation violation, the trial court is vested with the statutory authority to "revoke probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered." T.C.A. § 40-35-311(e). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension." *Id.* § 40-35-310 (2006). The trial judge retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995).

We conclude that the record reflects that the trial court exercised a conscientious and intelligent judgment. The court did not abuse its discretion when it found by a preponderance of the evidence that a violation had occurred, and we know that "[o]nly one basis for revocation is necessary." *State v. Alonzo Chatman*, No. E2000-03123-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Knoxville, Oct. 5, 2001). Both the community corrections rules and the probation rules state, in essence, that a defendant shall not garner new criminal charges. The trial court found that the defendant admitted to selling cocaine during the time period of the two transactions. We discern no arbitrary action in the trial court's determination. *See State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999) (holding that a defendant's concession of an act constituting violation of probation constitutes substantial evidence of violation, and trial court's revocation based thereon is not abuse of discretion).

Based on these findings in light of the preponderance of the evidence standard for showing a violation, we hold that the trial court did not abuse its discretion in revoking the defendant's community corrections and probationary sentences, ordering him to serve an effective 21-year sentence in confinement.

For the foregoing reasons, we affirm the trial court's orders. However, we remand for the correction of a judgment in case number S47,268. Count three should be amended to reflect the correct Code section, section 55-50-504.

JAMES CURWOOD WITT, JR., JUDGE